

Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)

TELEPHONE COMPANY-CABLE)
TELEVISION CROSS-OWNERSHIP)
RULES, Sections 64.54-64.58)

CC Dkt. No. 87-266

and)

Amendments of Parts 32, 36, 61,)
64 and 69 of the Commission's)
Rules to Establish and Implement)
Regulatory Procedures for Video)
Dialtone Service)

RM-8221

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To: The Commission

COMMENTS OF LIBERTY CABLE COMPANY, INC.

Liberty Cable submits these comments in response to the Commission's request for suggestions about ways to ensure that video programmer channel sharing promotes competition in the delivery of video programming to consumers without undermining any other communications policy. The Commission sought such suggestions in its Third Further Notice in this proceeding.^{1/}

BACKGROUND

Liberty has substantial experience in delivering video programming to consumers in competition with cable TV systems since it is one of the nation's most successful SMATV operators.^{2/} Liberty also is interested in helping the Commission develop appropriate

^{1/} See Memo. Op. and Order on Recon. and Third Further Notice of Prop. Rulemaking at ¶¶ 268-75, 59 Fed. Reg. 63,971 (Dec. 12, 1994).

^{2/} Liberty operates a 72-channel SMATV system in the heart of New York City in competition with the franchised cable operator, Time Warner. Liberty has nearly 27,000 subscribers on this system.

policies governing the sharing of VDT channel capacity by those who offer programming to consumers. This is because Liberty already has leased channels on one trial VDT system in order to provide programming to consumers,^{3/} and it intends to lease channels on many commercial VDT systems in order to provide such programming if Commission channel sharing policies make it economically attractive to do so.

The Memorandum Opinion and Order and Third Further Notice deals with two, interrelated matters directly relevant to the development of competition in the distribution of programming to consumers. First, the Commission barred "anchor programmers," which it defines as any video programmer leasing "substantially all" of a LEC's analog capacity.^{4/} Second, while barring anchor programmers, the agency decided tentatively to let programmers lease fewer than "substantially all" channels, and it asked for suggestions about what regulations should govern these multi-channel leases.

ARGUMENT

While Liberty agrees with the Commission's core objective to promote competition in the delivery of programming to consumers, it fears that the agency's bar against "anchor programmers" will actually stifle competition rather than promote it. As a result,

^{3/} Liberty provides a package of programming in New York City using the VDT system operated by New York Telephone Company. See New York Tel. Co., 8 FCC Rcd. 4325 (1993) (order approving application for authorization to construct trial VDT system serving three high-rise apartment buildings in New York City).

^{4/} Memo. Op. and Order at ¶ 35.

Liberty intends to file a petition for reconsideration of the Commission's decision barring anchor programmers.

While Liberty believes that a ban on anchor programmers will stifle competition, it wholeheartedly agrees with the agency's determination in its Further Notice to require "channel sharing" by VDT programmers in order to promote such competition. In fact, the single best thing the Commission can do to facilitate competition is to permit anchor programmers but require them to share their channels with all programmer customers who desire access to them. A proposed regulatory structure to govern such channel sharing is presented below.

First, the Commission should ensure that a LEC selects the anchor programmer fairly if more than one programmer desires to serve in that capacity. This can be done by a rule which requires a LEC to select the anchor programmer based on an objective standard designed to ensure the availability of high-quality programming service to all of the LEC's programmer customers. This standard should require the LEC to select an anchor programmer based on each applicant's (a) prior experience in the video programming market, (b) financial resources, (c) negotiated program acquisition costs, and (d) willingness to enter a long-term contract to act as the anchor programmer.

In addition, the Commission should ensure that all channel lessees have access on reasonable terms to the anchor programmer's programming fare. It can do this by requiring the anchor programmer to resell its programming to any other video programmer

desiring to incorporate into its service any programming carried by the anchor programmer. Under this resale obligation, the anchor programmer should have a duty to resell its programming on a channel-by-channel basis, and on a geographic basis where technologically possible.^{5/} In addition, the anchor programmer should be barred from reselling its programming to other channel lessees at a profit in order to ensure that other video programmers can obtain VDT channel capacity on reasonable terms. Instead, the anchor programmer should resell channels to other video programmers at a price which permits recovery of all of its costs in providing this resale service (including program acquisition costs and fees for leasing VDT capacity), but it should be barred from marking up any of these costs. This will ensure that any profit earned by the anchor programmer will come from its provision of programming to consumers rather than from its provision of programming to other video programmers.^{6/}

^{5/} Geographic resale apparently will be technologically possible on many VDT platforms. See, e.g., letter from Anthony M. Alessi, Dir., Fed. Relations, Ameritech, to A. Richard Metzger, Jr. at 12 (filed in WPC-6926 et seq., May 9, 1994):

"If service demand could be met by delivering a different mix of channels to various communities within a video serving area, analog capacity could be expanded by narrowing the delivery area -- that is, offering different sets of channels to smaller areas within a given video serving office's area."

^{6/} The public interest does not require the Commission to mandate that the anchor programmer carry any particular programming. The anchor programmer will have an incentive, without any FCC mandate, to carry programming that is of interest to the local community since any profit it makes will come from distribution of its programming service to consumers.

The channel sharing regulations described above not only would facilitate competition in the delivery of video programming to consumers, they also are consistent with other communications policies. First, a LEC that complies with these requirements would not violate Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). That provision prohibits a LEC from offering a common carrier service, including VDT service, on terms that are unreasonably discriminatory. A LEC would comply with Section 202(a) in following the regulations proposed by Liberty since all programmer channel lessees, including the anchor programmer, would obtain channel capacity from the LEC on the same terms. Moreover, a LEC's selection of the anchor programmer in the circumstance where more than one programmer desired that responsibility would not violate Section 202(a) since that provision bars only those acts of discrimination which the Commission finds "unreasonable". The Commission plainly may hold that a LEC selecting the anchor programmer in accordance with the objective criteria identified above would not be engaged in "unreasonable" discrimination.

Nor would a LEC that complies with these requirements violate Section 613(b) of the Communications Act, 47 U.S.C. § 533(b). That provision bars a LEC from "determin[ing] how video programming is presented for sale to subscribers, including making decisions concerning the bundling or 'tiering' of programming or the price, terms, or conditions on which the programming is offered to subscribers."^{2/} Under the regulations described above, the LEC would

^{2/} Memo. and Order at ¶¶ 64, 74.

not determine how video programming is presented for sale to subscribers since the LEC would not sell programming to subscribers. Instead, the LEC would only lease channel capacity to video programmers, including the anchor programmer. It is those customers who would make all decisions about the terms under which programming is offered to subscribers.

CONCLUSION

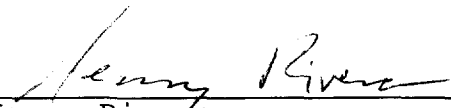
Liberty intends to file a petition which urges the Commission to reconsider its decision to bar anchor programmers on VDT systems. That petition will demonstrate that an anchor programmer is necessary to facilitate competition in the delivery of video programming to consumers, the core objective of all VDT regulatory policies. Rather than bar anchor programmers, the Commission should adopt regulations developed in response to the Third Notice which require the anchor programmer to share its channel capacity with all interested VDT programmer customers. These channel

sharing requirements will go a long way towards creating a regulatory environment under which multiple programmers can compete effectively in the delivery of programming to consumers.

Respectfully submitted,

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By


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